IN THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Arbitration case No.9 of 2006
Reserved on: **24.4. 2007**
Date of decision: **17.5.2007**

Rakesh Kumar Vij Petitioner.

Versus

State of H.P. & another Respondents.

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The Hon'ble Mr. Justice V.K.Ahuja, J.
Whether approved for reporting[1]?

For the petitioner: Mr. S.R.Sharma, Advocate.

For the respondents: Mr.Ashutosh Burathoki, Addl. Advocate General.

V.K.Ahuja,J.

Briefly stated, the facts of the case are that the Superintending Engineer HPPWD(Arbitration Circle), Solan was appointed as an Arbitrator with regard to the dispute arising between the parties in respect of the work "Shimla Bye pass, Phase-II and Km.7/195 to 12/125" vide agreement No.101 of 1994-95. The Arbitrator made an award on 24.6.2004 in regard to the dispute in between the parties. Objections were filed under Section 34 of the Arbitration Act against the said award by the petitioner and this Court vide its judgment dated 30.12.2004, set aside the award and remitted the matter to the Arbitrator for deciding it afresh. The main reasoning given by the Court was that no opportunity had been given to the parties to be heard. The

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[1] Whether the reporters of Local Papers may be allowed to see the Judgment?

Arbitrator heard the parties and thereafter passed the impugned award dated 4.1.2006.

Objections under Section 34 of the Act have been filed by the petitioner on the allegations that the petitioner had claimed a sum of Rs.25,53,428/- and the Arbitrator has allowed the claim to the extent of Rs.1,02,544/- and interest @ 9% per annum. The challenge made to the award is on the following grounds, namely,

i) That the impugned award was passed by the Arbitrator without giving an opportunity of being heard to the parties.

ii) The extension of time after the expiry of period of agreement was unilaterally granted by the respondent and the plea of the petitioner/claimant that he was entitled to market rate after the said period was ignored by the arbitrator without any cogent reason.

iii) That the Arbitrator had wrongly held that the Executive Engineer had conveyed his refusal for payment at enhanced rates as claimed by the claimant/contractor after the stipulated date of completion and even though there was no evidence on record.

iv) The Arbitrator had reproduced in verbatim the earlier award without giving any reasoning.

v) The Arbitrator had not considered the various correspondences in between the claimant and respondents while rejecting the claim of the claimant. The Arbitrator erred in rejecting the claim of the claimant with respect to security deposit of Rs.1,00,00/- by allowing partial claim for Rs.32,762/-.

(vi) That the interest awarded by the Arbitrator is on the lower side without any justification.

In reply, the respondents pleaded that the award was passed by the Arbitrator after hearing the parties and after the parties had finally closed their case which was closed with the consent of both the parties. It was pleaded that the work was started late by the contractor and there was no acceptance of the condition that the payment will be made at the market rate which was made at the agreed rate and the work was not completed within the stipulated period by the contractor. The plea of the contractor for payment beyond the agreed rates is not sustainable in the eye of law. It was pleaded that since no fresh documents were submitted by the parties, the Arbitrator passed the award on the similar lines and as such, it cannot be said that the award was the result of non-application of mind. It was pleaded that the award is self-speaking and the interest was awarded judiciously by the Arbitrator and the award is legal and valid as well as reasonable and as such the objections are liable to be dismissed.

On the pleadings of the parties, the following issues were framed by this Court.

1. Whether the Award of the Arbitrator is liable to be set aside since it is based on no evidence or on evidence which does not form part of the record of the arbitration proceedings? OPP
2. Whether the award of the Arbitrator dated 4th January 2006 is against the public policy of the Government of India and is liable to be set aside? OPP
3. Relief.

The parties submitted that no evidence is required to be led and the record of the Arbitrator can be gone through.

I have heard the learned counsel for the parties and have gone through the record.

The submissions were made by the learned counsel for the petitioner were in support of the objections and the grounds on which the award was challenged as enumerated above. No other point was urged by the learned counsel for the petitioner.

On the other hand, the learned Addl. Advocate General for respondents had raised arguments in support of the reply mentioned above. It was submitted that there can be no re-appraisal of evidence by this Court which is not sitting in appeal and since the evidence led by the parties has been discussed by the Arbitrator, there is no question of re-appraisal of the same.

Issues No.1 & 2

Both these issues are being taken up together.

I have gone through the objections filed by the petitioner and the grounds taken for setting aside the award. In regard to the first plea that the order passed by this Court was not complied with by the Arbitrator, a perusal of the Award in question shows that the earlier award was passed by the Arbitrator on 24.6.2004. The order was passed by this Court on 30.12.2004 and the case was remanded to the Arbitrator for giving an opportunity to the parties to be heard. A perusal of the impugned award shows that three hearings were held on 10.3.2005, 6.5.2005 and 30.6.2005 and the case was adjourned on the request made by the claimant/contractor. It was further observed that in the fourth hearing conducted on 13.10.2005 both the parties were present and detailed oral hearing was

conducted and counsel for the claimant also cited judgments of Apex Court which are mentioned therein also. It was observed by the claimant's counsel that whatever records were available with him had already been supplied to this forum and the parties relied upon the discussion already held in the previous hearings and both the parties stated that they had been given full opportunity to present their case in writing/orally and they have nothing more to submit and the proceedings of the case were closed with the consent of both the parties. No arguments were advanced that these observations were made by the Arbitrator incorrect. In view of the fact that opportunities were afforded to the parties to make their submissions and the proceedings were closed with their consent, therefore, it cannot be said that the order passed by this Court was not complied with and the Arbitrator had not given an opportunity to the parties particularly, the claimant. The contention put forth in this regard is repelled being devoid of any force.

Coming to the next plea that the Arbitrator had reproduced the award in verbatim. In case no fresh points are raised and no new submissions are made, it is not necessary for the Arbitrator to write the award again in a different manner. If he has not given reasons to differ or add to the previous award already made, no fault can be found with the award made by the Arbitrator and the plea put forth in this regard falls squarely on the ground. In so far as the plea that the interest was wrongly given at 9% is concerned, a perusal of the award shows that the Arbitrator had considered the question as to whether the interest

should be awarded to the claimant and had given reasons also. According to law, this Court is not sitting in appeal and it cannot examine the correctness of the award on merits and the question of grant of interest is within the discretion of the Arbitrator keeping in view the facts of the case and, therefore, this court cannot examine the correctness of the award in regard to the interest awarded by the Arbitrator.

I may make a reference to the decision of the Hon'ble Apex Court in ***Puri Construction Pvt. Ltd***. v. ***Union of India***, AIR 1989 SC 777 shows that in considering the provisions of Sections 30 and 33 of Arbitration Act, 1940 (old Act), the following observations were made which are relevant and are reproduced:

> "When a court is called upon to decide the objections raised by a party against an arbitration award, the jurisdiction of the court is limited, as expressly indicated in the Act, and it has not jurisdiction to sit in appeal and examine the correctness of the award on merits."

The plea raised in this regard is not tenable and hence is rejected accordingly,.

The only point to be considered as raised by the learned counsel for the petitioner was that the respondent/XEN had never written any letter rejecting the letter of the petitioner seeking market rates. The learned Arbitrator had wrongly concluded that the letter was replied to by the XEN which is not correct as per the record and therefore, those findings are liable to be set aside. In this regard, the submissions put forth by the learned Additional Advocate General were that even though no letter was

on record but it has been wrongly inferred by the Arbitrator that there was a letter but in case the said letter was never acted upon by the respondents since they chose not to send any reply, but the work was still continued by the contractor there is no acceptance of the offer made by the petitioner to be entitled to the market rates. Therefore, the rates as per the agreement had to be given which was considered by the Arbitrator and these observations though incorrectly made does not make the award not sustainable in the eye of law.

I may refer to the observations made by the Arbitrator as at page 12 of the Award, which read as under:

> "Refuting claim No.1 of the Claimant/Contractor respondent/Executive Engineer states that the work was agreed to be executed on the terms and conditions of the mutually agreed agreement and the contention of the claimant/contractor that he was entitled for payment at the analyzed market rates after the expiry of stipulated contract period was not covered under any clause of the agreement and thus needs to be set aside."

At page 22, the Arbitrator has observed as under:

> "Moreover, the respondent/Executive Engineer had conveyed his refusal for payment at enhanced rates as claimed by the claimant/contractor after the stipulated date of completion and even then the claimant/contractor continued execution of the work without any protest or reference. Moreover, though the claimant/contractor had referred to non payment of his claim of escalation under clause 10C but no such claim appears to have been ever preferred by him to the respondent/Executive Engineer and also was not supplied during the proceedings and has also not been claimed during the proceedings and has also not

been claimed under this Arbitration agreement and as such it is correct to infer that he never preferred any such claim with the respondent/Executive Engineer, being non-maintainable"

The above discussion leads to the inference that though the Arbitrator had referred to a letter written by Executive Engineer but the fact of sending a letter cannot be pointed out from the record however, there is substance in the plea raised by the learned Advocate General that in case the petitioner had asked for enhanced market rates after the period of contract was over but this plea was not considered since the delay was on account of the claimant who continued working on the same terms and conditions. It was only an offer made by the claimant who was either rejected by a letter written by the Executive Engineer or it was not accepted by the respondents. The fact remains that it was an offer which was not accepted and there was no contract in between the parties in regard to the payment of market rates, therefore, the Arbitrator had rightly considered the evidence and therefore, this plea has to be rejected.

Apart from the above, provisions of Section 30 of the new Act are clear that the award can be set aside if it is against the public policy. The term 'public policy' was considered by their Lordships of Hon'ble Apex Court in ***Oil and Natural Gas Corporation Ltd.*** vs. ***Saw Pipes Ltd.,*** (2003) 5 SCC 705 which shows that in reference to the provisions of Section 34(2) (b) (ii), Arbitration and Conciliation Act, 1996, it was held that the phrase "public policy of India" should be given a wider and not a narrower meaning. It was held that the court can set aside the

award if it is given contrary to fundamental policy of Indian law, or the interest of India, or justice or morality or is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court. Further, illegality of a trivial nature can be ignored.

A perusal of the objections filed by the petitioner/claimant show that there is not even a whisper that the award was against 'public policy' and nothing was alleged as to how the award can be considered as against public policy and for what reason provisions of the earlier Act have been amended wherein the award could be challenged even on 'misconduct' but as per the new Act Court has to be satisfied that the award was against the public policy of India and in what manner. There can be no re-appraisal of evidence by this Court which is not sitting in appeal and there is nothing on record to show that as to how the award is patently illegal or is so unfair and unreasonable that it shocks the conscience of the Court. Therefore, from whichever angle the award in question is considered, the objections filed under Section 30 of the Act are not maintainable and no reason has been assigned as to how the award suffers from any illegality within the meaning of Section 30 of the Act being against public policy. Both the issues are accordingly decided as against the petitioner and in favour of the respondents since the award is based upon evidence and due discussion, therefore, the objections filed are dismissed accordingly and the award is confirmed and is made the Rule of the Court. There is no order as to costs.

17th May, 2007 (V.K.Ahuja),J.
(SDS)